Dato' Abul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-2099 OF 2011
ABDUL MALIK ISHAK, SYED AHMAD HELMY AND BALIA YUSOF JJCA
7 MARCH 2012

B

C

Civil Procedure — Third party proceedings — Contribution from third party — Director sued by companies for fraud and misappropriation of funds — Director's application for leave to issue third party notices against co-directors refused by High Court — Whether refusal proper — Whether applicant failed to show prima facie case for grant of leave — Whether filing of third party proceedings inordinately delayed

D

The appellant was a director of the first respondent. Both respondents had filed a High Court action against the appellant for breach of his fiduciary duties as director of the first respondent, for conspiring to defraud the respondents and committing fraud against them and for knowingly and dishonestly assisting a third party to facilitate the misappropriation of the respondents' funds. It was alleged in that suit that the appellant and the third party had, within days of their appointment to the board of the first respondent, transferred monies from the first respondent's account to others and had kept silent about their actions during the company's board meeting. It was only about three years after that suit was filed that the appellant applied for leave to issue third party proceedings for indemnity and contribution against the other six directors of the first respondent. He proposed to claim against them for breaching their fiduciary duties to the first respondent, managing the respondents' business without proper procedure and internal control, acting against the best interests of the respondents and for failing to ensure that true and accurate accounting records of the respondents were maintained at all material times. When the High Court refused the appellant's leave application, the appellant filed the instant appeal to the Court of Appeal. His attempts to stay the trial pending disposal of the appeal were unsuccessful.

E

F

G

H

Held, dismissing the appeal with costs:

(1) The appellant took nearly three years to file the third party proceedings. It was gross and inordinate delay and an abuse of process of court. The third party proceedings would invariably further delay the completion of the trial (see paras 14 & 32).

I

(2) Prior to the filing of the third party notices, the appellant had not made

any demand against the proposed third parties. Such lackadaisical attitude pointed to a case of an afterthought on his part (see para 15).

(3) A director who had misapplied company funds by advancing money for a non-authorised purpose was not entitled to obtain contribution from the other directors. The appellant had failed to show a prima facie case that would entitle him to secure leave to issue third party notices against his co-directors (see para 23).

[Bahasa Malaysia summary

Perayu adalah pengarah responden pertama. Kedua-dua responden telah memfailkan tindakan Mahkamah Tinggi terhadap perayu untuk kemungkiran tugas-tugas fidusiarinya sebagai pengarah responden pertama, kerana berkomplot untuk menipu responden-responden dan melakukan fraud terhadap mereka dan kerana sedar dan secara tidak jujur membantu pihak ketiga untuk memudahkan penyalahgunaan wang responden-responden. Ia didakwa di dalam tindakan bahawa perayu dan pihak ketiga telah, dalam masa beberapa hari selepas pelantikan mereka menjadi lembaga pengarah responden pertama, memindahkan wang daripada akaun responden pertama kepada yang lain dan tidak memberitahu mengenai tindakan mereka semasa mesyuarat lembaga syarikat. Lebih kurang tiga tahun selepas tindakan tersebut difailkan baru perayu memohon izin untuk mengeluarkan prosiding pihak ketiga untuk indemniti dan pengagihan kepada keenam-enam pengarah responden pertama yang lain. Dia mencadangkan untuk menuntut daripada mereka untuk kemungkiran tugas-tugas fidusiari mereka kepada responden pertama, menguruskan perniagaan responden-responden tanpa prosedur dan kawalan dalaman yang betul, bertindak menentang dengan kepentingan terbaik buat responden-responden dan kerana gagal untuk memastikan yang rekod perakaunan yang betul dan tepat responden-responden dikekalkan pada kesemua masa material. Apabila Mahkamah Tinggi menolak permohonan izin perayu, perayu memfailkan rayuan ini kepada Mahkamah Rayuan. Percubaannya untuk menangguhkan perbicaraan sementara menunggu pendengaran rayuan tidak berjaya.

Diputuskan, menolak rayuan dengan kos:

(1) Perayu mengambil hampir tiga tahun untuk memfailkan prosiding pihak ketiga. Ia adalah kelewatan melampau dan penyalahggunaan proses mahkamah. Prosiding pihak ketiga akan selanjutnya sentiasa melewatkan penyelesaian perbicaraan tersebut (lihat perenggan 14 & 32).

(2) Sebelum pemfailan notis-notis pihak ketiga, perayu tidak membuat apa-apa tuntutan terhadap pihak-pihak ketiga yang dicadangkan. Sikap tidak bersungguh-sungguh mengarahkan kepada satu kes sesuatu yang difikirkan kemudian olehnya (lihat perenggan 15).

(3) Seorang pengarah yang menyalahgunakan wang syarikat dengan

mendahulukan wang bagi tujuan tidak dibenarkan tidak berhak untuk memperolehi sumbangan daripada pengarah-pengarah lain. Perayu gagal untuk menunjukkan kes *prima facie* yang memberikan dia hak untuk mendapatkan izin untuk mengeluarkan notis pihak ketiga terhadap rakan pengarahnya (lihat perenggan 23).]

Notes

For cases on contribution from third party, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8615–8616.

Cases referred to

Aberdeen Rly Co v Blaikie Bros [1854] 1 Macq 461, HL (refd)

Asia Commercial Finance (M) Bhd v Kaline Holdings Sdn Bhd & Ors and Kaline Holdings Sdn Bhd & Ors, third parties [1994] 4 CLJ 102, HC (refd)

Boardman v Phipps [1967] 2 AC 46, HL (refd)

Burford, In re; Burford v Clifford [1932] 2 Ch 122, CA (refd)

Chong Yew Kee & Anor v Wah-Chang International Corp Pte Ltd & Anor (New Zealand Insurance Co Ltd, third party) [1995] 1 SLR 153, HC (refd)

Ewe Keok Ngoh v Ooi Soon Tin & Ors [1926] 2 MC 107 (refd)

FBI Foods Ltd-Les Aliments FBI Ltee v Irving Glassner and Cadbury Schweppes Inc and Cadbury Beverages Canada Inc [2001] BCSC 151, SC (refd)

Great Eastern Rly Co v Turner (1872) LR 8 Ch App 149 (refd)

Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] 1 All ER 1126, PC; [1974] AC 821 (refd)

Kewangan Bersatu Bhd v Victory Ceramics Industries Sdn Bhd & Ors [2002] 5 MLJ 225, HC (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung, Re v Kong Thai Sawmill (Miri) Sdn Bhd & Ors [1976] 1 MLJ 59, FC (refd)

Lands Allotment Co, Re [1894] 1 Ch 616, CA (refd)

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226, SC (refd)

Movitex Ltd v Bulfield [1988] BCLC 104, Ch D (refd)

Multi-Code Electronics Industries (M) Bhd & Anor v Gordon Toh Chun Toh & Ors [2009] 9 CLJ 659, HC (refd)

Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] 2 All ER 563; [1983] Ch 258, CA (refd)

Percival v Wright [1902] 2 Ch 421, Ch D (refd)

Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd [2009] 2 MLJ 102; [2010] 2 CLJ 457, CA (refd)

Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134n, HL (refd)

Smith and Fawcett, Limited, In re [1942] 1 All ER 542; [1942] Ch 304, CA (refd)

Legislation referred to

Companies Act 1965 s 132
Rules of the High Court 1980 O 16 r 8, O 34, O 34 r 4(2)(m)

Appeal from: Suit No D8–22–453 of 2008 (High Court, Kuala Lumpur)

Puteri Shehnaz Majid (Sharon Khoo with her) (Cheah Teh & Su) for the appellant/second defendant.
G Rajasingham (Mohd Shahrul Fazli & Tracy Wong with him) (Shearn Delamore & Co) for the respondents/plaintiffs.

Abdul Malik Ishak JCA (delivering judgment of the court):

[1] This is the judgment of this court.

[2] On 8 August 2011, the High Court dismissed Dato' Abul Hasan bin Mohamed Rashid's (the second defendant's) application for leave to issue third party notices as per encl 251. Aggrieved, the second defendant, a director of the first plaintiff, appeals to this court.

[3] The proposed third party by the name of Gordon Toh Chun Toh is the first defendant in the plaintiffs' civil suit and no leave is required under O 16 r 8 of the Rules of the High Court 1980 ('RHC') to issue third party notice to him and the second defendant subsequently proceeded to issue the third party notice against the first defendant (*In re Burford, Burford v Clifford* [1932] 2 Ch 122 (CA); and *Ewe Keok Ngoh v Ooi Soon Tin & Ors* [1926] 2 MC 107).

[4] The second defendant is seeking leave to bring third party proceedings for indemnity and contribution against the six directors of the first plaintiff. But before leave to issue a third party notice is granted to the second defendant, he must show a prima facie case.

[5] Now, the suit was filed on 7 April 2008. But it was only on 13 July 2011 that the second defendant sought leave to issue third party proceedings for indemnity and contribution against the six directors of the first plaintiff, namely:

(a) Dato' Bahari bin Haron;

(b) Mohd Noor bin Ibrahim;

(c) Lena Loh Yun Ling;

(d) Dato' Mohd Nadzir bin Mahmud;

(e) Goh Kar Chun; and

(f) Dato' Haji Sulaiman bin Ahmad.

[6] The third party proceedings must be viewed as independent proceedings between the second defendant as plaintiff and the six directors as defendants (*Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 (SC); and *Chong Yew Kee & Anor v Wah-Chang International Corp Pte Ltd & Anor (New Zealand Insurance Co Ltd, third party)* [1995] 1 SLR 153). The second defendant in filing the third party application for indemnity and contribution, has to satisfy the court that there is a question proper to be tried as to the liability of the six directors to provide indemnity and make a contribution, be it in whole or in part. To put it differently, the second defendant has to show a prima facie case.

[7] When the High Court refused leave to issue third party notices on 8 August 2011, the second defendant moved the High Court orally for a stay of the trial pending disposal of his appeal at the Court of Appeal. But the High Court dismissed the second defendant's oral application for a stay. The second defendant then filed the present appeal by way of a notice of appeal dated 9 August 2011.

[8] On 16 August 2011, the second defendant filed an application by way of notice of motion to the Court of Appeal for an order to stay the trial before the High Court pending the disposal of his appeal. On 24 August 2011, the Court of Appeal dismissed the second defendant's application for stay with costs. And the trial commenced before the High Court on 31 August 2011.

[9] Essentially, the plaintiffs' claims against the second defendant are for:

(a) reach of the second defendant's fiduciary duties as a director of the first plaintiff;

(b) fraud upon the plaintiffs;

(c) conspiracy to defraud the plaintiffs; and

(d) rendering knowing assistance and dishonestly assisting Gordon Toh Chun Toh (the first defendant) in facilitating the misappropriation of the plaintiffs' funds.

[10] While the second defendant's claim for indemnity and contribution hinged on the following grounds:

(a) that the six directors of the first plaintiff individually or collectively as members of the Board of Directors of the first plaintiff have breached their fiduciary duties to the first plaintiff;

A (b) that the six directors of the first plaintiff carried out the management of the plaintiffs' business without regard to proper procedure and internal controls;

(c) that the six directors of the first plaintiff acted contrary to the best interest of the plaintiffs; and

B

(d) that the six directors of the first plaintiff failed to ensure that proper accounting records are maintained in respect of the plaintiffs' financial affairs at all material times and to ensure that the same is true and accurate reflection of the financial status of the plaintiffs.

C

[11] Mr G Rajasingham for the plaintiffs emphasises the following salient facts:

(a) on 23 March 2007 (Friday) both Gordon Toh Chun Toh (first defendant) and the second defendant joined the Board of the first plaintiff and were made joint signatories;

D

(b) from 26 March 2007 (Monday) to 28 March 2007 (Wednesday) both the first defendant and the second defendant uplifted monies from the first plaintiffs account to third parties; and

E

(c) on 29 March 2007 (Thursday) both the first defendant and the second defendant attended the Board meeting of the first plaintiff and they kept quiet; they did not inform the Board members that all the monies of the first plaintiff are gone.

F

[12] Madam Puteri Shehnaz Majid for the second defendant cautions us about delving into the merits of the case and, in the same breath, submits that the second defendant has denied receiving any part of and/or derived any benefit from any of the alleged unauthorised transactions whether directly or indirectly.

G

[13] These facts are certainly thought provoking but we refrain from making any comments. We are aware that the trial is ongoing at the High Court. Be that as it may, the facts have been set out by Kang Hwee Gee J (later JCA) in

H

Multi-Code Electronics Industries (M) Bhd & Anor v Gordon Toh Chun Toh & Ors [2009] 9 CLJ 659.

[14] We acknowledge that there was a delay on the part of the second defendant to issue third party proceedings for indemnity and contribution against the six directors of the first plaintiff. The second defendant took nearly three years to file the third party proceedings. It is a delay that is so gross and inordinate and it abuses the process of the court. We have considered the judgment of Kang Hwee Gee J (later JCA) in *Kewangan Bersatu Bhd v Victory Ceramics Industries Sdn Bhd & Ors* [2002] 5 MLJ 225 in regard to the issue of

I

delay. We have also considered the judgment of Abdul Malik bin Ishak JCA in *Razshah Enterprise Sdn Bhd v Arab Malaysian Finance Bhd* [2009] 2 MLJ 102; [2010] 2 CLJ 457 (CA), about the delay that was said to be too long to endure.

[15] We have also considered the argument that the second defendant has the right to bring a separate action against his fellow directors later. We noted that prior to the filing of the third party notices, the second defendant had not made any demand against the proposed third parties — the six directors of the first plaintiff. And such lackadaisical attitude points to a case of an afterthought on the part of the second defendant. It must be emphasised that the second defendant is not barred under limitation or jurisdiction for that matter from bringing a separate action against the proposed third parties. And it must also be emphasised that the second defendant is not prevented from filing a fresh action against the proposed third parties on the allegations as alluded to by the second defendant in his third party notices.

[16] In our judgment, an application for third party directions may even be made after judgment is given against the second defendant who issued the third party proceedings in the main suit (see *Asia Commercial Finance (M) Bhd v Kaline Holdings Sdn Bhd & Ors and Kaline Holdings Sdn Bhd & Ors, Third Parties* [1994] 4 CLJ 102).

[17] We cannot overlook the principle that company directors have co-ordinate liability to the company (*FBI Foods Ltd-Les Aliments FBI Ltee v Irving Glassner and Cadbury Schweppes Inc and Cadbury Beverages Canada Inc* [2001] BCSC 151). Perhaps a derivative action is the best solution for the second defendant to consider. But how could the second defendant commence a derivative action now in the name of the first plaintiff company when the first plaintiff is already suing several parties for the alleged losses of RM44,188,262.22 — a colossal figure? At this stage, the issues of res judicata and multiplicity of proceedings might be raised.

[18] As stated earlier, the plaintiffs' suit against the defendants including the second defendant's third party action against Gordon Toh Chun Toh (the first defendant) is currently ongoing before the learned Judicial Commissioner Lee Swee Seng. In fact, the trial before His Lordship commenced on 31 October 2011. The trial continued expeditiously on 1 November 2011, 21 December 2011, 22 December 2011, and 23 December 2011. It was fixed for continued hearing on 29 February 2012, and on that date, the plaintiffs would have called their ninth and final witness. Thereafter the plaintiffs would have closed their case. The trial is now scheduled to continue on 21 March 2012–23 March 2012 and on 2 April 2012–6 April 2012 for the defendants to open their respective cases.

[19] Now, the whole object of the third party procedure is to prevent a multiplicity of actions and to prevent the same question from being tried twice with possibly different results if heard before another judicial commissioner or judge. So, the argument that there is no prejudice to the second defendant if he subsequently takes out separate proceedings against his co-directors completely goes against the purpose and object of third party procedure as provided for by the law.

[20] We would like to make an observation that O 34 of the RHC calls for not only the expeditious and economical despatch of the case, it also calls for the just disposal of the suit. And by virtue of O 34 r 4(2)(m) of the RHC, the court may even order the addition of a third party to the action and proceed to deal with all directions consequent upon such addition.

[21] We venture to say that a director is not liable for the acts of his co-directors of which he has no knowledge and in which he has taken no part as his fellow directors are not his servants or agents to impose liability on him.

[22] The law is quite simple. A director owes no duty to his fellow director. His duties as a director are owed to the company. The duties of a director are amply set out in s 132 of the Companies Act 1965 and it reflects the common law position.

[23] It must also be borne in mind the principle that when a director has misapplied the company's funds by advancing money for a non-authorised purpose, he is not entitled to obtain contribution from the other directors (*Re Kong Thai Sawmill (Miri) Sdn Bhd, Ling Beng Sung v Kong Thai Sawmill (Miri) Sdn Bhd & Ors* [1976] 1 MLJ 59 (FC)). In our judgment, the second defendant failed to show a prima facie case that would entitle him to secure leave to issue third party notices against the six directors of the first plaintiff.

[24] It is a correct statement of the law to say that directors are fiduciaries and as such they are subject to the following strict duties:

(a) the directors must act bona fide in the interests of the company and must not exercise their powers for any collateral purpose;

(b) a director who, by using his position, makes a profit is liable to account for that profit; and

(c) where a director finds himself in a position where his duty to the company and his personal interests conflict, any contract entered is voidable at the instance of the company,

(see *Movitex Ltd v Bulfield* [1988] BCLC 104).

[25] There are strict fiduciary principles designed to ensure certain minimum standards of behaviour from directors with potentially severe penalties in the event of breach (*Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n; and *Boardman v Phipps* [1967] 2 AC 46). A

[26] Directors are regarded as trustees (*Great Eastern Rly Co v Turner* (1872) LR 8 Ch App 149 at p 152, per Lord Selborne; and *Re Lands Allotment Co* [1894] 1 Ch 616 at p 631, per Lindley LJ). B

[27] According to Lord Cranworth in *Aberdeen Rly Co v Blaikie Bros* [1854] 1 Macq 461 at p 471: C

> … it is a rule of universal application that no one, having such fiduciary duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. D

[28] A director must exercise reasonable care and skill as might reasonably be expected of a person of his knowledge and experience.

E

[29] Directors owe their duties to the company and not to individual shareholders. In *Percival v Wright* [1902] 2 Ch 421, a case in point, concerned the directors who purchased shares from existing shareholders without disclosing that they were in the process of negotiating a takeover bid at a higher price. It was held that since the directors owed no fiduciary duties to the shareholders, they could not be liable for the non-disclosure. It must be emphasised that textbook writers have criticised the decision of this case. But the principle still stands: directors owe their duties to the company and not to individual shareholders. F

G

[30] In *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] 2 All ER 563; [1983] Ch 258, it was held that:

> The directors indeed stand in a fiduciary relationship to the company, as they are appointed to manage the affairs of the company and they owe fiduciary duties to the company though not to the creditors, present or future, or to individual shareholders. H

[31] The directors' duties to act in what they consider to be in the best interests of the company must be qualified by the proviso that they must not act for any collateral purpose (*In re Smith And Fawcett, Limited* [1942] Ch 304; [1942] 1 All ER 542 (CA)). It must be borne in mind that the powers given by the articles to the directors are held in trust for the company and must not be I

exercised for any purpose other than that for which the power was conferred. If the powers are wrongly exercised, the transaction may be set aside notwithstanding the directors' assertions that they honestly believed it to be in the best interests of the company (*Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] 1 All ER 1126; [1974] AC 821 (PC)).

[32] It bears repetition to say that the trial before the learned judicial commissioner are proceeding smoothly. We have been advised that Gordon Toh Chun Toh — the first defendant, is terminally ill and for this reason there is an element of urgency that the trial should proceed expeditiously as scheduled. The third party proceedings would invariably further delay the completion of the trial bearing in mind that the second defendant took his own sweet time in filing his third party proceedings.

[33] In dismissing the second defendant's application for leave to issue third party notices, Justice Datuk Dr Haji Hamid Sultan bin Abu Backer has rightly exercised his discretion in accordance with the prevailing law. In our judgment, His Lordship's exercise of discretion is fair and sound.

[34] For these varied reasons, we dismiss the appeal of the second defendant with costs of RM10,000. Deposit should rightly go to the respondents plaintiffs.

Appeal dismissed with costs.

Reported by Ashok Kumar